



Judgment

41-Cr.APPEAL-536-2023

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 536 OF 2023

...

Shri Ravi s/o Subhash Jain,
Aged about 36 years, Occ- Business,
Proprietor of Shri. Ganesh Chillies Company,
31, Kalamana Mirchi Bazar, Kalamana,
Nagpur.

... **APPELLANT**

- - V E R S U S - -

Sutharam Shiva Bramahachari,
Aged Major, Occ-Business,
Shri Omkar Chilies General Traders,
H-6-78-B, Ramnagar, 10th Line,
Ongole-523002.

... **RESPONDENT**

Mr. Chandiram F. Bhagwani, Advocate for the Appellant.

CORAM : M.M. NERLIKAR, J.

DATE : SEPTEMBER 20, 2025.

ORAL JUDGMENT :

Though served, none present for the respondent. In spite of giving several opportunities, the respondent chose not to appear in the present proceedings.

2. Admit.

3. The appellant is seeking leave to appeal against the acquittal order passed by Learned 26th Joint Civil Judge, Junior Division and Judicial Magistrate, First Class, (Special Court 138 N.I. Act), Nagpur in S.C.C. No.10092/2011 dated 11/11/2016. The order was passed under Section 256 of the Code of Criminal Procedure, 1973, thereby dismissing the complaint for want of prosecution and accordingly the accused is acquitted.

4. Brief facts of the case are that:-

The complainant/appellant is dealing in the sales and distribution of Suruchi Spices and Chili Powder of AGMARK Quality and chilies as a whole under the name and style of Shri

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Ganesh Chilies Company. The respondent is also dealing in sales and distribution of whole chilles at Ongole under the name and style of Omkar Chilies General Traders. There were business transactions between the appellant and the respondent. As the business transactions between them were going smoothly, the appellant paid an amount of Rs.2,50,000/- by cheque as advance for dispatching the chilies, however, the respondent could not procure the goods and dispatch the same to the appellant. Accordingly, the respondent expressed his inability to the appellant and issued a cheque Bearing No. 687855 of Oriental Bank of Commerce, branch Jyothi Plaza, Kurnool Road, Ongole of Rs. 2,50,000/- dated 11/02/2010 towards the refund of amount outstanding against the respondent as per the books of account maintained by appellant. The cheque was presented by the appellant for encashment through HDFC Bank Ltd., branch Central Avenue Road, Nagpur. However, the said cheque was dishonored on 22/02/2011 for the reason "Payment stopped by drawer".

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Accordingly, the appellant received the intimation of the same vide intimation letter dated 22/02/2011 of HDFC Bank Ltd., branch at Nagpur. Thereafter, a notice was issued on 14/03/2011 to demand the payment of cheque amount of Rs. 2,50,000/- within 15 days from the date of receipt of the notice. As the payment was not made within stipulated time of 15 days, accordingly the appellant filed complaint before the Competent Court which is registered as S.C.C. no. 10092/2011. The summons was issued to the respondent, however, he has not appeared before the Trial Court. On 11/11/2016, the impugned order below Exh.1 was passed, whereby, the complaint is dismissed under Section 256 of the Code of Criminal Procedure, for want of Prosecution and for non-appearance of the complainant and the accused is acquitted accordingly.

5. The learned counsel for the appellant submits that the order passed by the Court below is against the factual

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position, as could be seen that the bailable warrant was issued to the respondent on 05/03/2014 and the matter was fixed for service of warrant against the respondent, and therefore, as per the advice of the advocate, the appellant did not appear. However, the case was transferred to the other Court. He further submits that on 08/12/2015 an application was moved for issue of non-bailable warrant for arrest against the respondent. The said application was allowed and the order of non-bailable warrant was issued and accordingly the case was fixed for service of non-bailable warrant of arrest against the respondent. Thereafter, the Court was vacant as the concerned Judge was on training between 06/04/2015 to 13/05/2016. Thereafter, again the case was transferred to another court on 11/08/2016, however, the notice of transfer was not issued to the appellant. He further submits that as the case was fixed for service of non-bailable warrant of arrest against the respondent, the appellant thought it is not necessary to attend the Court and he was completely dependent upon his advocate.

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However, abruptly the Learned 26th Joint Civil Judge, Junior Division, and Judicial Magistrate, First Class, (Special Court 138 N.I. Act), Nagpur on 11/11/2016 was pleased to pass the order of dismissal of complaint under Section 256 of the Code of Criminal Procedure and acquitted the respondent. He further submits that under such circumstances as mentioned above, the order is not tenable in law.

6. Upon hearing the learned counsel for the appellant and after perusing the record, it can be gathered that the impugned order was passed on 11/11/2016, however, on two occasions, i.e., 20/04/2015 and 11/08/2016, the complaint of the appellant was transferred from one Court to another Court. It seems from the record that the Presiding Officer in the interregnum was on training. Further, bailable as well as non-bailable warrant were issued against the respondent and the case was pending for taking steps. After transfer of the case on 11/08/2016, it appears that no notice was issued to the present

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appellant and accordingly on 16/09/2016 and 15/10/2016 the complainant was not present when the matter was called out and accordingly on 11/11/2016 the complaint was dismissed for want of prosecution under Section 256 of the Code of Criminal Procedure and the accused was acquitted.

7. Under such circumstances, it would be useful to refer to the case of *Shri Shaikh Akbar Talab VS Shri A.G. Pushpakaran & Another, 2018 ALL MR (Cri) 1208, Shri Shaikh Akbar Talab VS Shri A.G. Pushpakaran & Another, 2018 ALL MR (Cri) 1208*, in Paragraph No.14, it is observed as under:

“ In all these cases cited (supra) the complaint was dismissed under Section 256 of CrPC by the learned Magistrate due to absence of the complainant. It is held that principles of natural justice are required to be followed by giving an opportunity to the complainant to prosecute the complaint on merits as well as an opportunity is to be given to the accused to contest the complaint on merits. Therefore, the matters were restored by quashing and setting aside the impugned orders.”

8. It is to be noted that the respondent neither appeared

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in the Court below, nor in the present proceedings, though duly served, as can be seen from the earlier order passed by this Court. It was observed in the order dated 06/12/2024 that respondent is recently served and in order to afford him one more opportunity, appeal be listed before the Court after Christmas Vacation. Again by order dated 20/01/2025, the respondent sole was served. In spite of service, the respondent has not appeared and the matter was again adjourned by three weeks. Again on 14/02/2025, the matter was adjourned. Therefore, considering the fact that the present proceeding is filed in the year 2017, notices were issued, the application for delay was allowed, thereafter, the notices were again issued to the respondent, however, for a considerable long time, either it was returned back or it was not served on the respondent. Eventually, by order dated 07/08/2023, this Court was pleased to grant leave to file appeal. Accordingly, the present appeal was registered and numbered as 536/2023 and it was directed to be placed for final hearing. Thereafter, again the notices

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were issued to the present respondent and it seems that the respondent was served which could be gathered from the order dated 06/12/2024. However, the respondent failed to appear before this Court.

9. I have perused the order dated 11/11/2016 passed below Exh-1, wherein, the learned Court below was pleased to dismiss the complaint for want of prosecution under Section 256 of the Criminal Procedure Code and the accused was acquitted. I have also examined the *roznama* placed on record, typed copy is at Page Nos.16-A to 16-C. The same demonstrates that not only the case was transferred on two occasions, but also bailable as well as non-bailable warrants were issued against the respondent, however, the reports of the non-bailable warrant are awaited. Meanwhile, on the second occasion, the matter was transferred on 11/08/2016, wherein, the *roznama* says that record was received by transfer. However, on 16/09/2016 and 15/10/2016 none appeared for

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the complainant and accordingly the impugned order was passed on 11/11/2016. Admittedly, after transferring the complaint to the other court on 11/08/2016, it appears that there was no notice served to the complainant/present appellant. Under such circumstances, the Court below ought not to have passed the order under Section 256 of the Code of Criminal Procedure.

10. Considering the fact that the complaint was dismissed for want of prosecution and the accused was acquitted, in my opinion, the appellant has given sufficient explanation upon perusal of *roznama* so as to warrant interference in the order dated 11/11/2016. Considering this fact, the Court ought to have adopted a liberal approach as the appellant and his counsel though on few occasions did not appear, however, the applications were filed for issuance of bailable as well as non-bailable warrant and the report of that non-bailable warrant was awaited. Considering, the attending

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circumstances appearing on record, it would be just and proper to afford a reasonable opportunity to the appellant to pursue his cause on merits. Therefore, I am inclined to allow the present appeal. As could be gathered from the judgment in the case of *Shri Shaikh Akbar Talab (supra)*, wherein it is held that the principles of natural justice are required to be followed by giving an opportunity to the complainant to prosecute the complaint on merits, as well as, an opportunity is to be given to the accused to contest the complaint on merits. The principles of natural justice is the cardinal principle of law and backbone of judicial process. Opportunity of hearing and right to present the case are statutory incorporations of natural justice by mandating procedural safeguards, and therefore, the Court below ought not to have taken a harsh and hyper-technical view by dismissing the complaint for want of prosecution and accordingly violates procedural safeguards. For the reasons stated above, I deem it appropriate to allow the appeal. Hence, the following order:-

ORDER

(i) The Appeal is **allowed**.

(ii) The impugned order passed by Learned 26th Joint Civil Judge, Junior Division and Judicial Magistrate, First Class, (Special Court 138 N.I. Act), Nagpur in S.C.C. No.10092/2011 dated 11/11/2016, dismissing the said complaint in default under Section 256 of the Code of Criminal Procedure and consequently acquitting the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, is quashed and set aside.

(iii) Summary Criminal Case No. 10092/2011, stands restored to file at its original stage.

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(iv) The appellant / complainant shall appear before the Trial Court on 07/10/2025 for cross-examination.

(v) The appellant shall proceed with the matter without seeking any adjournment and shall co-operate with the Trial Court. The Trial Court may grant adjournment in exceptional circumstances.

(vi) The above order is subject to payment of cost of Rs.5,000/-. The cost shall be deposited by the applicant in the Trial Court. The said cost shall be paid to the respondent.

(vii) The appeal is disposed of, accordingly.

[**M. M. NERLIKAR, J**]